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91-1407

No. 91-_____

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

WHITE BUFFALO CONSTRUCTION INC.,

Petitioner,

v.

J. ARLIE BRYANT, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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QUESTIONS PRESENTED FOR REVIEW

1. When a federal court is ruling on contract issues in a diversity case, does state law govern interpretation and construction of contract terms?

2. Did the Ninth Circuit overlook findings that were unquestionably and irrefutably erroneous?

LIST OF INTERESTED PARTIES

1. White Buffalo Construction, Inc.[1]
2. Transamerica Insurance Company[2]
3. J. Arlie Bryant, Inc.

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[1] *There are no parent or subsidiary companies.*

[2] *The bonding company for White Buffalo Construction, Inc. but not a party in this action.*

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PETITION FOR WRIT OF CERTIORARI

Petitioner White Buffalo Construction, Inc. (hereafter "White Buffalo") respectfully prays that the Court issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit and reverse its judgment.

OPINIONS BELOW

The court of appeals' opinion is not published but the result is reported as a Table Case in 935 F.2d 277 (Ninth Cir. 1991). It is attached as Appendix B. The district court's findings of fact and conclusions of law are not reported and are attached as Appendix F.

JURISDICTION

The Court has jurisdiction to issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review its decision. 28 U.S.C. § 1254(1).

The memorandum and judgment of the Ninth Circuit were entered on June 13,

1991 (App B & C). Rehearing was denied on September 27, 1991 (App A).

An Order for a extension of time for filing a petition for a writ of certiorari was granted on February 1, 1992 by Justice O'Connor (App E). The time for filing was extended to and including February 1, 1992.

STATUTES INVOLVED

ORS 42.220 Consideration of circumstances.

"In construing an instrument, the circumstances under which it was made, including the situation of the subject and of the parties, may be shown so that the judge is placed in the position of those whose language the judge is interpreting."

STATEMENT OF THE CASE

Plaintiff/subcontractor J. Arlie Bryant, Inc. (hereafter "Bryant") brought this action under the Miller Act, 40 USC §270(a) against defendant/contractor White

Buffalo and its bonding company, Transamerica Insurance Company, for non-payment for labor and materials furnished in connection with Bureau of Indian Affairs Project No. YIR 1104. Defendant filed an answer, affirmative defense and a counterclaim alleging that plaintiff breached the parties' subcontract, claiming backcharges in an amount in excess of $30,000.

On October 15, 1990, the parties appeared before the U.S. District Court for the Eastern District of Washington for a bench trial. Rather than proceeding to a full trial, however, the district court restricted the testimony to the "threshold" issue of the proper interpretation of the contract. (Tr. 77.) In this regard, the district court heard limited testimony from Luther Clevenger, President of White Buffalo.

After receiving the testimony of Mr.

Clevenger, the district court concluded that it need not consider the parties' factual contentions and entered judgment for plaintiff as a matter of law. (Tr. 80, 84-86.)[3] Specifically, the district court held that the parties' subcontract unambiguously allowed plaintiff "approximately two and one-half months" to complete its contractual obligations and that there was no genuine issue of material fact as to whether plaintiff did so. In the alternative, the district court held that if "two and one-half months" is ambiguous, it must be construed against the defendant. (Tr. 81.)

Further, the district court held that the contract unambiguously allowed plaintiff to cancel its $3,000,000

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[3] *Although the district court held that it would hear testimony concerning defendant's claim that it incurred $247.50 for testing the quality of the crushed rock and the appropriate date from which interest should accrue on the back charges, those issues were resolved by the parties. (See Tr. 21, 85-88; see also Findings of Fact and Conclusions of Law, 6 (July 30, 1990).)*

insurance coverage upon completing its work under the contract. (Tr. 83.) Consequently, the district court held that no genuine issue of fact was raised by plaintiff's cancellation of $2,000,000 of its insurance coverage in late February, 1987. In so holding, the district court concluded that the fact that plaintiff hired an individual to return to the project site in late March and early April to remove logs was irrelevant to the insurance issue. (Tr. 83-84.) In the alternative, the district court held that if the subcontract was ambiguous, it must be construed against defendant. (Tr. 84.) The Ninth Circuit subsequently affirmed through a memorandum decision in which it treated the district court's contract interpretation as a fact and consequently reviewed only for clear error and not de novo. (App. B).

REASONS FOR ALLOWING THE WRIT

The Ninth Circuit did not apply the correct standard of review to the contract rulings made by the District Court in this diversity case. The Court treated the trial court's contract interpretation as a factual determination and therefore reviewed the determinations made below only to see if they were "clearly erroneous." This was an error. Consistent with the practice in other federal circuits and applying state (Oregon) law the Ninth Circuit should have reviewed the contract interpretations de novo and, having done that, reversed.

The sum and substance of this Court's reasoning appears in the following language:

> "Because the District Court relied on extrinsic evidence in interpreting the subcontract agreement, 'its interpretation of the contract will not be reversed unless it is clearly erroneous.' In re United States Fin Sec Litig, 729 F2d

2628, 632 (9th Cir 1983). (App 5)

> "The District Court's interpretation of the contract was not clearly erroneous." (App 5)

We respectfully submit that the Court's review is erroneous and flawed for two reasons.

First, the undisputed evidence is that Bryant, not White Buffalo authored the insurance provision. (App Br 30-31; Reply Br 11.) Consequently, the trial court's finding that White Buffalo was the author is unquestionably and irrefutably erroneous.

Second, the Court should have followed state (Oregon) law and construed the contract de novo and should not have applied the federal "clearly erroneous" fact standard to the contract interpretation. Other federal circuits recognize that in diversity cases interpretation and construction of contracts is governed by state law. See,

e.g., Cloud v. Trustees of Boston University, 720 F2d 721, 724 (1st Cir 1981): Lockette v. Greyhound Lines, Inc., 817 F2d 1182, 1185 (5th Cir 1987): Madsen v. Prudential Federal Sav. & Loan Ass'n, 635 F2d 797, 802 (10th Cir 1980): Vernon v. Resolution Trust Corp., 907 F2d 1101, 1109 (11th Cir 1990). The Ninth Circuit itself has even held that state and not federal law controls issues of contract interpretation in a diversity case. In re Aslan, 909 F2d 367, 369 (9th Cir 1990). Finally, this Court too recognizes that state, not federal, law ordinarily governs contract issues. United States v Yazell, 382 US 341, 86 S Ct 500, 15 L.Ed.2d 404 (1966).

Here, the parties agreed that their contract would be governed by Oregon law. (See Ex 102, § XVIII at 18.10.)(App D) Under Oregon law, it is the presence or absence of ambiguity, not whether

extrinsic evidence is considered, which determines whether contract interpretation is a matter of fact or a matter of law. Whether a term is ambiguous is an issue of law, never an issue of fact. Deerfield Commodities v. Nerco, Inc., 72 Or App 305, 696 P2d 1096 (1985). In making the legal (not factual) determination whether contract language is ambiguous, courts operating under Oregon law are expressly authorized to consider extrinsic evidence. Welch v U.S. Bancorp, 286 Or 673, 690, 596 P2d 947 (1979); Card v Stirnweis, 232 Or 123, 374 P2d 472 (1962); Contra Jarrett v United States National Bank, 81 Or App 242, 725 P2d 384 (1986) (purporting to distinguish Welch and Card).

> "In construing an instrument, the circumstances under which it was made, including the situation of the subject and the parties, may be shown so that the judge is placed in the position of those whose language the judge is interpreting." ORS 42.220.

As the express references to "the judge" emphasize, consideration of these "surrounding circumstances" does not render the process of construing the contract one of fact determination. Rather, deciding whether language is ambiguous remains purely a question of law whether extrinsic evidence is or is not considered.

> "In deciding if the language of the contract is ambiguous, it is proper for the court to consider extrinsic evidence regarding the circumstances under which an agreement was made or to which it relates." Adams v. Knoth, 102 Or App 238, 244, 794 P2d 796 (1990) (decided after Jarrett and consistently with Welch and Card).

Additionally, in Sunset Coatings Co., Inc. v. Department of Trans., 62 Or App 53, 56, 660 P2d 164 (1982), the court explained:

> "*** In determining whether a contract provision is ambiguous the court may consider 'the circumstances under which it was made, including the situation of the subject and of the parties ***, so that the judge is placed in the position of those whose language he is interpreting.'"

The process both of deciding whether contract terms are ambiguous and of interpreting unambiguous terms remain purely questions of law, not questions of fact. Adams v. Knoth, 102 Or App at 243 (whether a contract is ambiguous is a question of law for the court); Deerfield Commodities v. Nerco Inc., 72 Or App at 305 (interpretation of unambiguous contract terms is an issue of law for the court). The Ninth Circuit erred in reviewing the contract interpretation as if it were a factual finding.

CONCLUSION

The Ninth Circuit erred in applying the federal "clearly erroneous" standard to the state legal issues of contract interpretation raised in this appeal. This violated both Oregon law and the practice in other federal circuits.

For the reasons stated above, the Court should issue a writ of certiorari to

the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit's decision is inconsistent with other United States courts of appeal and has so far departed from the accepted and usual course of judicial proceedings that it calls for an exercise of this Court's power of supervision. White Buffalo respectfully suggests that review by certiorari and reversal is appropriate.

Respectfully submitted,
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[4] *When the extension of time for filing a petition for a writ of certiorari was sought by Luther L. Clevenger, President of White Buffalo, he was proceeding pro se. It was later determined that legal counsel would be required for the corporation.*

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, for the use and benefit of J. ARLIE BRYANT, INC., a Washington corporation,	NO. 90-35730
Plaintiff-Appellee,	D.C. NO. CV-87-AAM 0467-AAM
v.	ORDER
WHITE BUFFALO CONSTRUCTION, INC., an Oregon corporation; TRANSAMERICA INSURANCE COMPANY, a California corporation,	
Defendant-Appellant.	

Before: WRIGHT, FARRIS and THOMPSON,

Circuit Judges.

The petition for rehearing is denied.

APPENDIX B

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, for the use and benefit of J. ARLIE BRYANT, INC., a Washington corporation, Plaintiff-Appellee, v. WHITE BUFFALO CONSTRUCTION, INC., et al., Defendant-Appellant.	NO. 90-35730 D.C. NO. CV-87-0467-AAM MEMORANDUM*

Appeal from the United States District Court for the Eastern District of Washington Alan A. McDonald, District Judge, Presiding

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* *This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.*

Submitted June 4, 1991**

Seattle, Washington

Before: WRIGHT, FARRIS and THOMPSON, Circuit Judges.

White Buffalo Construction, Inc. ("White Buffalo") appeals the district court's judgment in favor of J. Arlie Bryant, Inc. ("Bryant") in Bryant's action under the Miller Act, 40 U.S.C. §§ 270a-270d. White Buffalo contends the district court erred in its interpretation of a subcontract agreement between White Buffalo and Bryant. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

Paragraph IX(b)(1) of the subcontract agreement required Bryant to maintain liability insurance coverage of $3 million

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** *The panel unanimously finds this case suitable for disposition without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.*

for at least "two years after completion of the Principal Contract." Paragraph IX(b)(2), however, allowed Bryant to cancel its liability insurance coverage after "completion of the work, without written consent of contractor." Paragraph 4 of the agreement required Bryant to complete its work "in no event (unless an extension is granted to [Bryant]) later than Nov. 18, 1986." Paragraph 4 of the agreement's "Special Conditions," however, provided that Bryant "shall commence and complete his work within approximately two and one-half months."

The district court reviewed the provisions of the subcontract agreement, heard testimony, and considered the parties' exhibits. After considering this evidence, the district court concluded that the agreement unambiguously gave Bryant the right to cancel the required liability insurance when its work on the

project was completed, and that Bryant's completion of all work on the project some twelve days beyond the November 18, 1986 date was "within approximately two and one-half months" as permitted by the contract.

Because the district court relied on extrinsic evidence in interpreting the subcontract agreement, "its interpretation of the contract will not be reversed unless it is clearly erroneous." In re United States Fin. Sec. Litig., 729 F.2d 628, 632 (9th Cir.1983).

The district court's interpretation of the contract was not clearly erroneous. The evidence established that the language giving Bryant the right to cancel liability insurance coverage upon "completion of the work," and the language permitting completion of the work "within approximately two and one- half months" was added to the agreement at Bryant's

request and modified the earlier provisions pertaining to insurance coverage and the November 18, 1986 completion date. In interpreting the contract, the district court sufficiently considered all relevant evidence. The court was not required to hear evidence as to White Buffalo's unilateral understanding, nor did the court fail to consider applicable provisions of the subcontract agreement.

AFFIRMED.

APPENDIX C

JUDGMENT

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NO. 90-35730

CT/AG#: CV-87-0467-AAM

UNITED STATES OF AMERICA, for the use and benefit of J. ARLIE BRYANT, INC., a Washington corporation

Plaintiff - Appellee

v.

WHITE BUFFALO CONSTRUCTION, INC., et al.

Defendant - Appellant

APPEAL FROM the United States District Court for the Eastern District of

Washington (Spokane) .

THIS CAUSE came to be heard on the Transcript of the Record from the United States District Court for the Eastern District of Washington (Spokane) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the case be, and hereby is AFFIRMED, to the District Court. Cost taxed in the amount of $200.00, in favor of Appellee.

Filed and entered June 13, 1991

APPENDIX D

"18.10 The laws of the State of Oregon shall govern as to all matters arising under or relating to this agreement. Any action or arbitration hereunder shall be brought and maintained in Multnomah County, Oregon, and in either state or federal court, as appropriate; provided, however, that if the Principal Contract prescribes a different venue, then any action or arbitration hereunder may be transferred and consolidated with a proceeding brought under the Principal Contract, if permitted under applicable law."

APPENDIX E

Supreme Court of the United States

No. A-484

White Buffalo Construction Inc., et al.,

Petitioners

v.

United States

ORDER

UPON CONSIDERATION of the application of the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including February 1st, 1992.

/s/ Sandra day O'Connor

Associate Justice of the Supreme Court of the United States

Dated this 7th day of January, 1992.

APPENDIX F

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, for the use and benefit of J. ARLEY BRYANT, INC., a Washington corporation, Plaintiff, v. WHITE BUFFALO CONSTRUCTION COMPANY and TRANSAMERICA INSURANCE COMPANY, Defendants.	No. C-87-467-AAM FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on for trial on July 16, 1990, before the Honorable Alan A. McDonald, the plaintiff being represented by James P. Hutton and Velikanje, Moore & Shore, Inc., P.S. and by Ronald M. Somers. The defendants were represented by Richard Alexander of Stoel, Rives, Boley, Jones & Grey and Thomas Cochran and Tony Tompkins of Witherspoon, Kelley, Davenport and Toole.

The Court heard all of the

testimony offered by the parties and considered the relevant exhibit of the plaintiff numbers 1 through 24 and 26 and of the defendants numbers 101 through 190, which were admitted by stipulation of the parties (with exceptions as noted on the record), surrounding the negotiation and execution of the Subcontract Agreement between the parties (Exhibits 102 or 1A) and makes the following:

FINDINGS OF FACT

1. All findings of Fact stated by the Court in its oral decision rendered July 16, 1990, are hereby incorporated by reference into this document as Findings of Fact in this decision.

2. Defendant White Buffalo was awarded the prime contract on project YIR 1104 on July 28, 1986.

3. J. Arlie Bryant Inc. received oral notice to proceed from White Buffalo on September 2, 1986 and was at work on

the project site on September 3, 1986. Bryant agreed to crush rock for White Buffalo at a rate of $2.74 a ton and produced in accordance therewith 105,259.17 tons of material.

4. Bryant commenced crushing aggregate rock for the project on September 29, 1986 and finished crushing aggregate rock for the project on November 20, 1986. White Buffalo completed hauling and placing of the crushed aggregate rock on the project on November 20, 1986. Bryant completed source pit clean up and removal of its crushing equipment on November 28, 1986.

5. The BIA accepted 105,259.17 tons of crushed aggregate rock as within specifications of the prime contract and made full payment thereon to White Buffalo at $7.87 per ton (Exhibit Nos. 2c and 2d).

6. Bryant had liability insurance coverage of $3 million under the

Subcontract Agreement through and including Bryant's completion of the project on November 28, 1986.

7. Bryant's removal of logs from the BIA right-of-way off project YIR 1104 did not result in delay in finalizing project YIR 1104.

8. Defendant Transamerica Insurance Company, a California corporation, executed for the benefit of the plaintiff and the United States of America a bond in accordance with the provisions of Title 40 of the United States Codes § 278. J. Arlie Bryant provided timely written notification to all parties as required by 40 U.S.C. § 270(b) and stated with substantial accuracy the amount of the claim and the name of the parties to whom the labor and materials were furnished.

9. Bryant is entitled to interest on all unpaid sums from June 30, 1987 until paid. White Buffalo owed $67,495.02 from

June 30, 1987 until making a payment of $37,495.02 on October 26, 1987. Exhibit 26. Plaintiff is entitled to $30,0000.00 together with accrued interest until date of judgment.

CONCLUSIONS OF LAW

1. All Conclusions of Law stated by the Court in its oral decision rendered July 16, 1990, are hereby incorporated by reference into this document as Conclusions of Law in this decision.

2. The Court heard all testimony offered by the parties and considered all of the exhibits of the parties admitted by stipulation surrounding the negotiation, execution and/or modification of the Subcontract Agreement between the parties and determines the following issues as matters of law.

3. The Court has received and considered the parole testimony of Luther Clevenger, principal in defendant White

Buffalo Construction, Inc., cognizant of the integration clause contained in § 18.13 of Exhibit 1a. The integration clause bars the parole testimony offered. The Court concludes that the Subcontract Agreement was prepared by the defendant in the following respects:

a. Defendant inserted the language contained in § 4 of Attachment A to Exhibit 1(a) as follows:

> "Subcontractor acknowledges that contractor is unable to perform his work without an ample stockpile of the specified aggregate. Subcontractor shall immediately commence work upon receiving notice to proceed and shall work continuously and diligently until the work is completed. Subcontractor shall commence and complete his work within approximately two and one-half months."

b. Defendant inserted the language contained in § IX(b) (2) of Exhibit 1(a) as follows:

> " *** Subcontractor shall not cancel any policies or insurance required hereunder <u>until completion of the work, without written consent</u>

of Contractor. All policies shall name contractor, its officers, directors, agents and employees as additional insureds and shall contain waiver of subrogation rights against contractor and its representatives."

The specific language inserted by the defendant in the Subcontract Agreement at § 4 of Attachment A does not require the plaintiff to have finished the plaintiff's work on BIA project YIR 1104 by November 18, 1986. The Court concludes that a 10 to 12 day lag beyond November 18, 1986, in the completion of the plaintiff's work is within the meaning of the phrase "approximately two and one-half months" and that even if "approximately two and one-half months" is an ambiguous term such ambiguity must be construed against the defendant who inserted the language.

4. The Court concludes that Subcontract § IX (b) (2) clearly gives the plaintiff the right to cancel its policies

of insurance after completion of its work. The plaintiff's performance was accepted by the project owner as of November 28, 1986. The Court further concludes that even if the defendant argued that there was some ambiguity or conflict between the language of § IX(b) (1) and § IX(b) (2) that that ambiguity must be construed against the defendant who inserted the ambiguous language.

5. The court rules as a matter of law that the defendant's claims of delay damages and for payment of extended insurance premiums must by dismissed with prejudice (Exhibit 123).

6. The defendant withdrew its claim for testing costs of $247.50 plus overhead and profit and the Court concludes that that portion of the defendant's counterclaim should also be dismissed with prejudice.

7. The parties stipulated in open

court that the plaintiff would be entitled to prejudgment interest at 9% simple interest from June 30, 1987 on any unpaid amounts until the date of judgment. The Court concludes that plaintiff is entitled to such prejudgment interest.

8. The Court concludes that defendant Transamerica Insurance Company is bound for the payment of plaintiff's claims herein pursuant to 40 U.S.C. § 270 et. seq.

9. The plaintiff is entitled to judgment against the defendants, jointly and severally, in the sum of $30,000.00, plus prejudgment interest at the rate of 9% per anum on $67,495.02 from June 30, 1987, to October 26, 1987, and at the rate of 9% per annum from October 27, 1987, through July 16, 1990, for a total prejudgment interest in the sum of $9,302.32, plus plaintiff's costs and reasonable attorney's fees pursuant to §

6.5 of the Subcontract Agreement in the sum of $24,214.79 for a total judgment of $63,517.11.

10. The defendant White Buffalo Construction's counterclaims should be dismissed with prejudice.

11. The court after considering all of the evidence and the testimony adduced at trial finds generally for the plaintiff and against the defendants.

DONE IN OPEN COURT this 30 day of July, 1990

_____

Alan A. McDonald
Judge